

Federal Court



Cour fédérale

Date: 20190325

Docket: IMM-4136-18

Citation: 2019 FC 365

Ottawa, Ontario, March 25, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

FRED BRONI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Fred Broni, is a citizen of Ghana who seeks review of the July 27, 2018 decision of the Refugee Appeal Division (RAD) rejecting his claim for refugee protection. The RAD confirmed the Refugee Protection Division (RPD) decision that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the RAD is reasonable.

I. Background

[3] The Applicant claims refugee status on the basis of being a gay man from Ghana. He claims to have had a same-sex relationship with a fellow student at boarding school in 2008, which was discovered by his father in 2014. He says he was beaten by his father and other men, and following another beating and threats, he fled Ghana.

[4] In considering his refugee claim the RPD found that the Applicant was not credible and his sexual orientation was not established. Among other concerns, the RPD noted that the Applicant refused to disclose evidence of a public chat profile despite being directed to do so.

II. RAD Decision

[5] On appeal to the RAD, the Applicant did not provide any submissions addressing the specific errors he claims were made by the RPD. Notwithstanding this, the RAD undertook an independent assessment of the RPD record. The RAD also took into account the “Chairperson’s Guidelines: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression”.

[6] The RAD relied on the guidance in the case of *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 [*Dhillon*], which states at paragraph 20, “It is not the RAD’s function to supplement the weaknesses of an appeal before it, or, for that matter, of the refugee protection claim presented in the first place. It is also not its role to come up with new ideas that might assist appellants in succeeding with their appeal and, ultimately, their refugee claim.”

[7] The RAD reviewed all of the evidence before the RPD and listened to the audio recording of the RPD hearing. The RAD did not find any errors with the RPD decision. The determinative issue for the RPD was credibility. In particular, the RPD noted that, despite the Applicant’s allegation that he posted to the public website “Meetme”, he refused to provide any evidence from this website such as screenshots. Although he was given an opportunity to provide this evidence to substantiate his claim that he is a homosexual, and despite his profile being open to the public, the Applicant refused to disclose any information on the grounds that it was private. The RPD found the Applicant’s explanation for refusing to disclose this information was inadequate and the RAD detected no error with this finding.

[8] The RAD further relied on the decision of Chief Justice Crampton in *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102, where he states at paragraph 37:

By simply satisfying itself that no such additional errors were made, the RAD’s decision should not become vulnerable to being set aside on judicial review, based solely on its general concurrence with findings made by the RPD in respect of matters that were not raised on appeal by the Applicants. In my view, this would largely vitiate the purpose of Rule 3(3)(g) of the *Rules*, which requires an appellant to identify (i) the errors that are the grounds of the appeal, and (ii) where those errors are located in the RPD’s decision, or in the transcript recording of its hearing.

[9] Accordingly, the RAD dismissed the appeal and confirmed the September 5, 2017 decision of the RPD.

III. Standard of Review

[10] The standard of review for the RAD's findings and assessment of evidence is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [*Huruglica*] at para 35). Particularly, in assessing the credibility of evidence, the RPD may have a meaningful advantage over the RAD and, as such, the RAD ought to review the RPD's credibility findings on a standard of reasonableness (*Huruglica* at para 70).

IV. Issues

[11] On this judicial review, the Applicant raises the following issues:

- a. Was the Applicant's birth certificate properly considered?
- b. Is there a certified question regarding the obligation of the RAD to conduct an independent assessment when the Applicant has not complied with Rule 3(3)(g)?

V. Analysis

A. *Was the Applicant's birth certificate properly considered?*

[12] On this judicial review, the Applicant argues that the RAD failed to address the issue of his birth certificate and, specifically, how it was obtained and by whom. The Applicant submits that the finding on the birth certificate goes to the core of his claim. He challenges the conclusion of the RPD that his father obtained his birth certificate. This raised a significant credibility concern for the RPD as the Applicant was allegedly fleeing persecution at the hands of his father for being homosexual.

[13] However, the Applicant did not raise this issue before the RAD as required by Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*Rules*], which states:

3 (3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

(g) a memorandum that includes full and detailed submissions regarding

(i) the errors that are the grounds of the appeal,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

(iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,

(iv) the decision the appellant wants the Division to make, and

(v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.

[14] The Applicant argues that, although this issue was not raised directly with the RAD, it can still be raised in the context of this judicial review as the RAD has an obligation to conduct an independent assessment of the evidence and of the RPD decision. In effect, the Applicant is arguing that even if he did not identify an error by the RPD, the RAD still has an affirmative obligation to identify errors of the RPD.

[15] While I agree with the Applicant that the RAD has an obligation to conduct an independent assessment of the evidence and of the RPD decision, the RAD does so within the parameters of Rule 3(3)(g). This *Rule* makes it clear that it is the Applicant's obligation, and not the RAD's obligation, to identify errors made by the RPD and to make submissions accordingly. It is neither logical nor reasonable to expect the RAD to search the record and find something to make the case for the Applicant. In fact, this approach has been specifically denounced in the guiding case of *Dhillon*.

[16] The Applicant relies on the case of *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 [*Ghauri*], to support the argument that, even if an issue with the RPD decision is not raised before the RAD, a judicial review can still succeed. However, a review of *Ghauri* shows that there the Court was faced with a very different set of circumstances. Furthermore, as noted in *Ghauri*, this is more of an exception, and Justice Gleeson states at paragraph 34 "...[M]y decision on these facts should not detract from the following principle that emerges

from the case-law: appellants before the RAD that fail to specify where and how the RPD erred do so at their peril.”

[17] The Applicant further argues that, even if the error regarding the birth certificate was not raised before the RAD under Rule 3(3)(g), the error is still plain and obvious such that the RAD had the ability to correct it. The Applicant points to the national documentation information on the computerization of birth certificates, which was information available to the RAD. The Applicant argues that, in reviewing the national documentation package, the RAD would have discovered that the reference to the Applicant’s father on the birth certificate document does not necessarily indicate that his father obtained the birth certificate. Regardless, even if this “error” can be answered with reference to the country condition information, this argument wrongly presumes that this was the sole credibility issue identified by the RPD.

[18] The Applicant mistakenly emphasizes the credibility issues surrounding the birth certificate as being determinative of his claim. However, there were other significant credibility issues that even the RAD made in its independent assessment. For example, the Applicant failed to produce evidence, which he alleged existed, to corroborate his claim of being homosexual. The Applicant took no issue with these other credibility findings on this judicial review. In the circumstances, I agree with the comments in *Zhu v Canada (Citizenship and Immigration)*, 2017 FC 615 at paragraphs 20 and 21 as follows:

It is surprising that Ms. Zhu does not take issue with the determinative issue for the RAD. Specifically, Ms. Zhu does not challenge the RAD’s conclusion that she is not a genuine practitioner of the Church of the Almighty God. Unchallenged credibility findings must be presumed to be true (*Liu v Canada (Citizenship and Immigration)*, 2015 FC 207 (CanLII) at paras 28-

30). This unchallenged finding was dispositive of the claim. If she is not a member of the Church of the Almighty God, there is no reason for the Chinese authorities to be seeking her, and she would not have to avoid detection at the border.

As this finding was not disputed, I find that the RAD's conclusion is reasonable and the RAD's credibility finding on this point will withstand judicial review.

[19] In this case, the determinative credibility issue for the RAD was not just the Applicant's birth certificate but it was also the Applicant's failure to disclose his public chat profile.

[20] In any event, the RAD did undertake an independent assessment of the record and found no errors with the RPD decision. This finding was within the RAD's discretion and was reasonable.

B. Is there a certified question regarding the obligation of the RAD to conduct an independent assessment when the Applicant has not complied with Rule 3(3)(g)?

[21] The Applicant asks to certify a question regarding the obligation on the RAD to conduct an independent assessment of the record.

[22] The test for certification was recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, where at paragraph 46 the Court states, "The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance."

[23] In my opinion, the obligation of the RAD to conduct an independent assessment has been fully answered in the leading case of *Huruglica*, where the Court considered the function of Rule 3(3)(g) within the larger context of the RAD's duties and summarized at paragraph 103:

I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[24] Here the RAD did conduct an independent assessment of the record and upheld the RPD findings which were grounded in a lack of evidence and credibility concerns. Therefore, the question posed by the Applicant does not arise on the facts of this case and will not be certified.

JUDGMENT in IMM-4136-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed. No question is certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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